Supreme Court, U.S.
FILED
DEC 6 1977
MICHAEL RODAK, JR., CLERK

Nos. 77-164 and 77-169

In the Supreme Court of the United States

OCTOBER TERM, 1977

EARL LEPPO, PETITIONER

v.

UNITED STATES OF AMERICA

REUBEN GOLDSTEIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A)[1] is not yet reported.

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[1]"Pet. App." refers to the Appendix in No. 77-164.

JURISDICTION

The judgment of the court of appeals was entered on May 27, 1977. Petitions for rehearing were denied on June 30, 1977. The petitions for a writ of certiorari were filed on July 29, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the applications for orders to conduct electronic surveillance of petitioners sufficiently established that other investigative methods were inadequate or unlikely to succeed.

2. Whether the evidence against petitioner Leppo that derived from the electronic surveillance should have been suppressed because the applications for authority to conduct that surveillance failed to identify him as a person known to be engaged in the commission of the offense under investigation.

3. Whether the trial court erred in quashing petitioner Leppo's *subpoena duces tecum* seeking documents relating to his motion to suppress the testimony derived from the electronic surveillance.

4. Whether the government withheld favorable evidence from petitioner Leppo relating to the identification of his voice on the tapes.

5. Whether a government witness' spontaneous reference to petitioner Leppo's silence upon being given *Miranda* warnings denied him due process.

STATUTE INVOLVED

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing * * * the interception of a wire * * * communication * * * shall include the following information:

> * * * * *
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including * * * (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;
>
> (c) a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be to dangerous;
>
> * * * * *

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner Leppo was convicted on five counts and petitioner Goldstein on four counts of using interstate telephone facilities to carry on unlawful gambling activity, in violation of 18 U.S.C. 1952. Petitioner Leppo was sentenced to five concurrent terms of one year's imprisonment and fined $5,000. Petitioner Goldstein was sentenced to four concurrent terms of three years' imprisonment.[2] The court of appeals affirmed (Pet. App. A).

The evidence established that between June 13 and July 8, 1973, petitioners used interstate telephone facilities to carry on unlawful gambling activity. Petitioner Goldstein, operating from Las Vegas, would telephone Martin Sklaroff, a Miami bookmaker, and give him information

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[2]Co-defendant Martin Sklaroff was sentenced to four years' imprisonment and fined $5,000.

relating to professional baseball, including the "line" (the odds on the outcome of the game). Several minutes later petitioner Leppo, a bookmaker operating in the Boston area, would call Sklaroff, receive the line information, which was usually unchanged from the line Sklaroff received from Goldstein, and then place substantial bets with Sklaroff. During the 15 days of interception, Sklaroff accepted bets from petitioner Leppo and others amounting to more than $500,000.

ARGUMENT

1. Both petitioners contend that the applications for electronic surveillance did not satisfy the requirements of 18 U.S.C. 2518(1)(c) because they did not explain why "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." Scrutiny of the affidavits (CA App. 21, 53)[3], however, fully supports the conclusion reached by the courts below that the applications satisfactorily demonstrated that ordinary investigative methods were not adequate to discover the full scope of the gambling operation and produce evidence necessary for a successful prosecution.

The affidavits accompanying the government's applications for intercept orders informed the court that the FBI agent in charge of this case had conducted several months of investigation into Sklaroff's illegal gambling activities and that, through the use of eight informants, the government had gathered information indicating that Sklaroff was using several telephone lines in Miami to

[3]"CA App." refers to Volume I of the appendix in the court of appeals, a copy of which we are lodging with the Clerk of this Court. "R." preceded by a volume number indicates the separately paginated record on appeal. "Tr." indicates the trial transcript.

conduct a bookmaking business (CA App. 21, 23, 28-30, 33-35, 39-40). By examining telephone company records the FBI Agent had determined the subscribers of these numbers (*id.* at 25). Surveillance of Goldstein and Sklaroff, among others, had also been employed, and it was known that each had been previously convicted of gambling-related offenses (*id.* at 23, 24, 28, 31-33, 35-39). The affidavits further stated that this evidence was insufficient for a prosecution of the suspects for unlawful gambling activity, since the FBI did not know the content of the telephone calls between Goldstein and Sklaroff, and all of the government's informants were unwilling to testify due to fear for their personal safety (*id.* at 23, 40, 42, 71-73). The affidavits also informed the court that it was the agent's experience that search warrants were inadequate because gambling records were often kept on either "flash" or water soluble paper, and even if not destroyed they were often sketchy and rarely established provable connections between all the participants in the illegal enterprise (*id.* at 40-41, 71-73).

The requirements of 18 U.S.C. 2518(1)(c) are satisfied when the application and supporting affidavit, viewed in a practical and commonsense fashion (S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), provide a sufficient factual basis for the issuing judge to conclude that conventional investigative techniques will be inadequate to expose the full scope of the criminal activity under investigation or the identity of the participants therein. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Scibelli*, 549 F. 2d 222, 226 (C.A. 1), certiorari denied June 7, 1977 (No. 76-1212); *United States* v. *Hinton*, 543 F. 2d 1002, 1011 (C.A. 2); *United States* v. *Armocida*, 515 F. 2d 26, 38 (C.A. 8), certiorari denied, 423 U.S. 858; *United States* v. *Robertson*, 504 F. 2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United*

States v. *Brick*, 502 F. 2d 219, 224 (C.A. 8). Moreover, "[M]erely because a normal investigative technique is theoretically possible, it does not follow that it is likely" (S. Rep. No. 1097, *supra*, at 101). Congress did not intend "to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents." *United States* v. *Hinton*, *supra*, 543 F. 2d at 1011. Here, the affidavits indicate that alternate investigative procedures were either attempted and found to be ineffective or not tried because it was the opinion of the agent, based upon his experience and the particular facts of this case,[4] that no benefit would be derived therefrom. They therefore satisfied the requirements of 18 U.S.C. 2518(1)(c). *United States* v. *Pachecho*, 489 F. 2d 554, 555 (C.A. 5), certiorari denied, 421 U.S. 554; *United States* v. *Smith*, 519 F. 2d 516, 518 (C.A. 9); *United States* v. *Kirk*, 534 F. 2d 1262, 1274 (C.A. 8), certiorari denied June 27, 1977 (No. 75-7001).

Petitioners argue, however, that the decision in this case is in conflict with the Ninth Circuit's decision in *United States* v. *Kalustian*, 529 F. 2d 585. We acknowledge that the *Kalustian* panel appears to have interpreted 2518 (1)(c) to require greater specificity in the supporting affidavits than has been required by other courts. But that opinion has not been followed in any other circuit[5] and does not even represent the consistent view of the Ninth

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[4]These included the facts that the subjects of the investigation were experienced gamblers, who had previously been convicted of federal gambling offenses, and that the informants with whom they dealt had spent most of their adult lives as gamblers or bookmakers.

[5]See, *e.g.*, *United States* v. *Scibelli*, *supra*; *United States* v. *Hinton*, *supra*; *United States* v. *Kirk*, *supra*.

Circuit.[6] Indeed, in *United States* v. *Spagnuolo*, 549 F. 2d 705 (C.A. 9), the court recognized that its circuit's decisions in this area "often lead to results difficult to harmonize" and tried "to promulgate a manageable standard by which to judge affidavits under 2518(1)(c)." 549 F. 2d at 709-710. The standard it adopted is that "the affidavit, read in its entirety, must give a factual basis sufficient to show that ordinary investigative procedures have failed or will fail in the particular case at hand * * *. An affidavit composed solely of conclusions unsupported by particular facts gives no basis for a determination of compliance with 2518(1)(c). *Kalustian* teaches no more than that." 549 F. 2d at 710. The Ninth Circuit standard as promulgated in *Spagnuolo* was clearly met here. Accordingly, even assuming that some conflict remains between the standard used in the Ninth Circuit and elsewhere[7], this case does not directly present that issue.

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[6]For example, in *United States* v. *Pezzino*, 535 F. 2d 483 (C.A. 9), the Ninth Circuit held that an affidavit not unlike the one here involved was sufficient. See also *United States* v. *Scully*, 546 F. 2d 255 (C.A. 9), certiorari denied, 430 U.S. 970; *United States* v. *Turner*, 528 F. 2d 143 (C.A. 9), certiorari denied *sub nom. Grimes* v. *United States*, 423 U.S. 996.

[7]Since no other court of appeals has followed *Kalustian*, and since the Department of Justice has since *Kalustian* made efforts to conform its applications to the stringent standards of that case (the present applications were submitted two years before the *Kalustian* decision), we have not believed it justified to ask this Court to review those cases that we have lost in the Ninth Circuit on the basis of this issue. Moreover, this Court has, since the time of the *Kalustian* decision, declined numerous requests to review decisions from the Ninth Circuit and other circuits alleged to be in conflict with *Kalustian* (see, *e.g.*, cases cited *supra*, notes 5 and 6), and nothing has happened recently to justify any change in this Court's refusal to review what is, at heart, an intra-circuit conflict of little continuing importance. Cf. *Wisniewski* v. *United States*, 353 U.S. 901.

2. Petitioner Leppo contends that the omission of his name in the application for electronic surveillance violated 18 U.S.C. 2518 (1)(b)(iv), which provides that an intercept application should contain, *inter alia*, "the identity of the person, if known, committing the offense and whose communications are to be intercepted." He urges that this alleged omission required suppression of the intercepted telephone calls as to him, since the omission is *per se* indicative of governmental bad faith.

The facts as presented to the district court in a pre-trial hearing indicate that, although the government knew that petitioner Leppo was committing gambling offenses, it had no reason to believe that petitioner was communicating with Sklaroff over the target telephone lines. It was discovered only after the interceptions that petitioner contacted Sklaroff from pay telephones, charging the calls to Michele Fortune and reimbursing her later (Tr. 142, 145, 147-149). Although Fortune was also under investigation, there was no evidence at the time to connect her with petitioner (Tr. 23-25). The district court therefore properly denied petitioner's motion to suppress, ruling that the government did not have probable cause to believe Leppo would be overheard on the telephones being monitored (Tr. 50).

In any event, even assuming *arguendo* (as did the court of appeals, Pet. App. 12), that petitioner Leppo should have been identified in the applications, this Court's decision last term in *United States* v. *Donovan*, 429 U.S. 413, holds that the omission does not justify suppression of his intercepted conversations. The Court in *Donovan* found it unnecessary to consider whether suppression might be appropriate if "Government agents knowingly failed to identify [known participants] for the purpose of keeping relevant information from the District Court that

might have prompted the court to conclude that probable cause was lacking" (429 U.S. at 436, n. 23). Although petitioner Leppo argues that this case presents that issue (Pet. No. 77-164, pp. 6-7), the record does not support any such assertion. Indeed, petitioner himself claims only that the omission was deliberately made "[f]or the sole purpose of expediting [the] investigation" (*id.* at 7), not that the identification of Leppo would have been in any way relevant to the district court's determination of probable cause.

3. Petitioner Leppo further contends (Pet. No. 77-164, p. 7) that the district court erred in quashing his *subpoena duces tecum* for production of FBI investigatory documents related to his motion to suppress evidence obtained through the interception. The documents sought by petitioner consisted of two telegrams and one letter sent to the Boston FBI office by the Miami FBI office between June 15 and July 12, 1973. The first communication instructed the FBI to discontinue surveillance of petitioner because the first intercept had been terminated. The other documents requested identification of a voice, thought to be petitioner's, intercepted in a June 13th conversation. Petitioner originally requested these documents in a discovery motion. After failing to obtain them by that means, he subpoenaed the agent in charge of the investigation.

The district court quashed the subpoena on the ground that petitioner was improperly attempting to use Rule 17, Fed. R. Crim. P., to circumvent the limitations imposed by Rule 16 on discovery of materials in the possession of the government. See *Bowman Dairy Co.* v. *United States*, 341 U.S. 214, 220; *United States* v. *Nixon*, 418 U.S. 683, 698-700; *United States* v. *Marcello*, 423 F. 2d 993, 1006 (C.A. 5), certiorari denied, 398 U.S. 959. Whatever the merits of

that ruling, petitioner received copies of the documents at trial (Tr. 858-861, 879-880)[8] and used them to support his suppression claim at a post-trial hearing, where they were considered by the district court in ruling on petitioner's motion (Tr. 904). Thus, even if the subpoena should not have been quashed, petitioner was not harmed, since he received and used the material he sought.

4. Petitioner Leppo argues (Pet. No. 77-164, p. 7) that the district court erred in denying his pre-trial motion for identification of two persons who had listened to the tapes and had been unable to identify petitioner's voice. The district court held that the government would be required to identify only any persons who had told the FBI that the voice on the tapes was not petitioner Leppo's—not persons who were simply unable to express any opinion concerning the identity of the speaker.

Petitioner Leppo's motion for identification itself reveals that he had already been told the identity of one of the individuals, Sidney Covich (III R. 670). At trial, the identification of Covich was confirmed, and the other person who could not recognize petitioner Leppo's voice was identified as FBI Agent John Jansen (Tr. 360). Petitioner Leppo brought the inability of both Covich and Jansen to identify Leppo's voice to the attention of the jury through cross examination (Tr. 451, 753)[9] and argued to the jury that this inability cast doubt

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[8]The documents were apparently made available to the trial judge, who, after *in camera* inspection, provided petitioner with the relevant items.

[9]Although the court indicated that it would permit Covich to testify directly to his inability to identify Leppo's voice (Tr. 369), counsel elected to bring this out by cross-examining an FBI agent (Tr. 753). Agent Jansen was himself cross-examined about his failure to identify the voice (Tr. 451).

on the other identification evidence (Tr. 996). Accordingly, even if petitioner Leppo was entitled to the disclosure of persons who could not identify his voice on the tapes (but cf. *Brady* v. *Maryland*, 373 U.S. 83; *Moore* v. *Illinois*, 408 U.S. 786, 794), he received and used that information. Petitioner does not suggest that he was in any way injured by the timing of the disclosure and nothing in the record suggests such injury. There is, in any event, no obligation to disclose even exculpatory information in advance of trial, *United States* v. *Agurs*, 427 U.S. 97, 108.

5. Finally, petitioner Leppo contends (Pet. No. 77-164, pp. 7-8) that a witness' passing reference to Leppo's silence upon being given *Miranda* warnings violated his Fifth Amendment rights.

While the prosecution was laying the foundation for the introduction of evidence seized from Leppo, a government agent testified that: "I executed a search warrant to his person, and he was advised of his rights according to the Advice of Rights Form" (Tr. 408). Defense counsel for codefedant Sklaroff objected, stating "The Government has not provided us with any statements of any witnesses and therefore I would object to this line of questioning" (Tr. 409). The court overruled the objection and the witness, apparently speaking to defense counsel, stated spontaneously that petitioner "declined to make any statement." *Ibid.* The court immediately instructed the jury that petitioner had no duty to come forward with any evidence or make any statement and that they should disregard the agent's response (Tr. 409-410), and it repeated this instruction, without specific reference to the incident, in its final charge (Tr. 1058).

It is clear that the prosecution did not plan to reveal petitioner's silence, much less to ask the jury to draw any conclusion from it. Cf. *Doyle* v. *Ohio*, 426 U.S. 610.

Instead, the witness' spontaneous response to a defense objection was simply an effort by the witness to explain to counsel what had transpired. Accordingly, this testimony did not violate petitioner Leppo's Fifth Amendment rights. *United States* v. *Haro-Portillo*, 531 F. 2d 962, 963-964 (C.A. 9). Moreover, considering the weight of the evidence against petitioner, the irrelevance of his silence when he was searched to any issue in dispute at trial, and the court's strong curative instructions, any possible error was harmless beyond a reasonable doubt. See *Egger* v. *United States*, 509 F. 2d 745, 747 (C.A. 7), certiorari denied, 423 U.S. 842.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1977.